

NNH-CV-21-6115824-S

ELM CITY LOCAL, CACP,	:	SUPERIOR COURT
Plaintiff,	:	J.D. OF NEW HAVEN
v.	:	at NEW HAVEN
CITY OF NEW HAVEN,	:	
Defendant.	:	January 5, 2022

**ELM CITY LOCAL, CACP'S BRIEF IN SUPPORT OF VACATING THE
ARBITRATION AWARD**

The CACP, Elm City Local, hereinafter the “union” or “Mr. Santiago,”¹ seeks vacation of the arbitration award by a panel of the State of Connecticut State Board of Mediation and Arbitration dated June 24, 2021. That award sustained the termination of Jason Santiago from the New Haven Police Department as supported by “just cause.” In its complaint filed in the Superior Court for the Judicial District of New Haven, the plaintiff contends that the “the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made,” in violation of Connecticut General Statutes section 52-418(4), by admitting expert testimony the hiring authority never considered when it made its termination decision, a misapplication of the “after-acquired evidence” doctrine. The plaintiff also contends that an inchoate and undisclosed conflict by one of the arbitrators resulted in an award resulting from “evident partiality” by one of the panel members,

¹ The undersigned represented the union at the underlying arbitration, and in the instant case, subject to a written waiver of the right to union representation signed by Jason Santiago, the terminated union member.

Dennis Murphy, in violation of Connecticut General Statutes section 52-418(2). The Record submitted in this case is sufficient to brief the first claim regarding “after-acquired evidence,” but not as to the claim for Mr. Murphy. In order to perfect that claim, the plaintiff will require permission either to depose Mr. Murphy or to submit to him written interrogatories. In the alternative, as to the claim regarding Mr. Murphy, the plaintiff requests a remand so that certain facts as to Mr. Murphy can be placed on the record by way of Mr. Murphy’s responding to questions put by counsel for the plaintiff. The plaintiff learned only after the hearing that Mr. Murphy is apparently related by marriage to one of the primary sponsors of the so-called Police Accountability Bill, Public Act 1, and that he may have relied on the advice and counsel of his spouse, in drafting the arbitration award.

I. The Nature of the Proceedings Before The SBMA

Mr. Santiago was terminated from his position as a police officer by the City of New Haven as a result of his use of force against an arrestee on Christmas Day, 2019. The investigation called into question whether Mr. Santiago was justified in punching, “kicking” and pulling the hair of a struggling arrestee. The City conducted an internal affairs investigation and relied upon a use of force instructor, Officer David Acosta. Officer Acosta reviewed extensive videotapes of the incident and concluded that the punch was justified but that the “kick” and hair-pulling were not. The City terminated Mr. Santiago based on Officer Acosta’s assessment.

At the hearing before the SBMA, Officer Acosta, under cross-examination for the first time, recanted his belief that any of the force used in this case was unjustified. The City obtained permission to offer the testimony of a new expert, an expert on whom the

City did not rely in its termination decision. The Union objected. This appeal raises the question of whether the “after-acquired evidence” doctrine supports the use of an expert testifying after the fact as to the justification for a municipal decision to terminate an officer. The union contends that there is no legal justification for the admission and use of such a decision in an arbitration proceeding. If the evidence considered by the City at the time of termination does not support “just cause” for the City’s action, then no eleventh-hour effort to supplement the record with evidence not presented to the City at the time of the termination decision can be used to support a conclusion of just cause.

In addition, the undersigned learned only after the hearing that the neutral magistrate on the panel, Dennis Murphy, is related by marriage to one of the primary sponsors of Connecticut’s recent Police Accountability Act, an act passed in the wake of widespread protests arising from the death in police custody of a man named George Floyd. Ironically, the George Floyd death was used as a justification for the City’s termination of Mr. Santiago, despite the gross dissimilarities between Mr. Floyd’s death and the use of force at issue here. Had the union been aware of Mr. Murphy’s relationship with the Act’s sponsor, counsel would have challenged Mr. Murphy’s suitability for service on this case. The union contends that Mr. Santiago was used as a scapegoat to defuse tensions in New Haven incident to protests over Mr. Floyd’s death in May 2020, a death occurring nearly six months after Mr. Santiago’s routine use of force on Christmas Day 2019.

II. An Overview Of The Evidence Presented to the Panel

Counsel for the City's opening statement was among the most significant information shared with the panel regarding why Mr. Santiago was terminated. Mr. Dugas told the panel Mr. Santiago was terminated because he used excessive force in the course of an arrest on Christmas morning in New Haven in 2019. "[W]e believe that the evidence on balance shows that there was excessive force ... [on] three points: kicking this gentleman when he was handcuffed and on his stomach, between the legs; the pulling him up by his hair; and ... the punch in the face." HT, p. 20. Although all of this took place in the presence of fellow officers while Mr. Santiago was dealing with an obstreperous and obviously intoxicated arrestee, none of the fellow officers reported anything amiss. Indeed, none of his fellow officers were ever disciplined for failing to report alleged misconduct that took place in their presence. It was not until a young prosecutor reviewed a video, in March 2020, that anyone took note of the force used. Thereafter, Mr. Santiago was terminated. Why?

Mr. Dugas then put it all into the context of our troubled times: "I would just add that we all can take judicial notice about what's been going on in terms of racial injustice and accountability in the state of Connecticut, throughout the country, and one of the criticisms that has been leveled is that police departments don't hold their people accountable." HT, p. 21.

Of course, the case had nothing to do with race or ethnicity. Both the arresting officer and the arrestee are Hispanic. What's more, even the internal affairs report submitted to the chief and thereafter acted upon by the police commission, concluded that the use of force was justified as to the punch to the face. Shockingly, at the hearing,

the use of force trainer, who made the findings on which the chief and police commission relied, repudiated his earlier findings and testified that he could not conclude, based on the record before him, and before the panel, that excessive force was used. Rather than do the right thing and come to the table to correct this miscarriage of justice, the City, mid-hearing, sought and bought the testimony of a new expert, who was not even part of the disciplinary process. That expert, a lawyer on whom the city relies for training, unsurprisingly concluded that the kick, the punch and the hair pull were unreasonable force. The expert was permitted to testify over the grievant's objection, with the panel promising to give the testimony such weight as it saw fit.

Mr. Santiago contended that there was insufficient justification for discipline of any kind, much less termination. He and fellow officers confronted a drunken and/or disturbed man on Christmas morning. Efforts to reason with the man were unavailing, and modest force was used to take him into custody consistent with Mr. Santiago's training. The city's decision to terminate is shocking and unconscionable, reflecting a failure of leadership by both Chief Reyes, who, unsurprisingly, has tendered his resignation, and Mayor Elicker. The SBMA's conclusion that the termination was supported by just cause is mere cynicism supported by an unprecedented misuse of the after-acquired evidence doctrine.

III. What The Evidence Actually Shows

A. The City's Evidence

1. An Alleged "Kick," A Punch, And Hair Pulling

The City's first witness was Detective Jessica Stone. Id, p. 32. She is a fourteen-year veteran of the New Haven Police Department. Id., p. 33. She was assigned to the Internal Affairs Unit briefly in 2020 and assigned the investigation of the complaint involving Jason Santiago. Id., pp. 34-35. She worked on the investigation with Sergeant Fennessy, her immediate supervisor. Id. p. 36.

The investigation was initiated after the New Haven Police Department received a "letter"² from an assistant state's attorney who had reviewed a video taken of the Christmas 2019 arrest. Id., p. 37. In summary form, the report reflected that an Officer Hinton, another New Haven police officer, reported at about 7 a.m. to a call involving a disabled motor vehicle and a "16," the code for an intoxicated person.³ The person, believed to be the driver, was Mr. Rivera; a female was also on site, Julie Cruz. Mr. Rivera appeared to be intoxicated and would not consent to the towing of the vehicle, which appeared to have a broken axle. Mr. Rivera was argumentative and Officer Hinton called for backup. Mr. Santiago and other officers responded to his call. Id., p. 40.

The investigators reviewed "numerous hours" of video, including both body-worn police cameras and a civilian video. They also listened to 911 calls, and interviewed all

² It was actually an email.

³ Officers later confirmed what appears to be obvious from watching the videotape: Mr. Rivera suffers from bipolar disorder. HT, January 19, 2021, p. 28.

the officers at the scene⁴, together with Mr. Rivera, and his wife, arrived at the scene shortly after police arrived. Id., p. 41. “Rivera is belligerent. He’s cursing at the officers. He’s cursing at the officers. He’s yelling. Julie Cruz is injecting herself into the situation,...” Id., p. 44. At some point, Mr. Santiago is heard to say that he’s “had enough of this guy.” Officer Santiago tried to gain control of Mr. Rivera, who pulled away. Id., p. 45. A struggle of “20 seconds or so” took place, as Officer Santiago tried to grab Mr. Rivera by the legs. Mr. Rivera was resisting, “grabbing ahold of the vehicle, the tire well, the van, the side of it, to not go to the ground.” Id.

Officers eventually got Mr. Rivera into handcuffs. After bending Mr. Rivera’s left leg “in an effort to get him to comply,” the officer could hear the handcuffs being applied. Officer Santiago released Mr. Rivera’s left and “appears to take a step back. And then it appears his right foot kicks him in the groin area.” Id., p. 45 Mr. Rivera then said “You kicked me in the nuts” or “my balls.” Id., p. 47. This is the alleged kick at the heart of this case.

Officer Santiago steps away and is heard to say “It didn’t have to be like this.” Id., p. 47 Mr. Santiago then “proceeds to lift [Mr. Rivera] up by his braids and he stands him up, and Officer Hinton appears to be helping him as well.” Id. This is the alleged hair pulling at the heart of this case.

Detective Stone then testified that “[a]t some point Officer Santiago is standing in front of Mr. Rivera, and – it happens very quickly, but you hear a --- like, what sounds like spitting sound. ... you can kind of see Mr. Rivera puckering his lips as if he is

⁴ Officer Hinton was the first officer to arrive at the scene. When he called for backup, Officers Santiago, Leonardo and Billups arrived. Id., p. 44.

spitting, ... And then Officer Santiago struck [Mr.] Rivera in the face, at which point he fell to the ground,..." Id. This is the alleged punch at the heart of this case.

This "kick," hairpulling and punch are the three uses of force the City argues justify the termination, whether those acts are taken in isolation or in the aggregate.

The panel had the opportunity to view the incident for itself as presented in various videos identified as City's Exhibits. Detective Stone testified she viewed the videos at least 10 times. Id, p. 48. Thereafter, an ambulance was called for medical attention for both Mr. Santiago and Mr. Rivera. Id., p. 49.

When Officer Santiago was interviewed, it appeared that his "perception or how he interpreted the spitting from Mr. Rivera seemed more frequent than it actually was occurring according to the body-worn camera footage." Id., p. 52. Officer Santiago seemed to believe that Mr. Rivera was spitting during "most" of the interaction. Id., pp. 53-54.

Significantly, Detective Stone could draw no conclusion from her investigation of the spitting.

Q. And so based upon the body-worn camera footage and your investigation of all the officers at the scene, what did you conclude in terms of when, if at all, spitting occurred by Mr. Rivera?

A. It appeared that Mr. Rivera spit after being handcuffed, stood up. That was when he spit.

Q. Okay. And in your mind, what was the significance of the timing of that?

A. I don't know, sir.... I mean, I couldn't say.

Id., p. 55.

Detective Stone was similarly opaque about her conclusions as to the alleged kick. After viewing the video, but before she interviewed Officer Santiago, she concluded that "[i]t appeared Officer Santiago's foot made contact with Mr. Rivera's

groin.” She could not, however, reach a conclusion about whether the contact was “intentional or incidental,”... “I guess I didn’t know,” she testified. *Id.*, pp. 57-58. When she interviewed Officer Santiago, he told her he did not “recall that happening during the incident.” *Id.*, P. 58 After viewing the video, Officer Santiago said that “it looks like he’s kicking Mr. Rivera, but he indicated that it was not intentional.” *Id.* She never asked Officer Santiago if he heard Mr. Rivera say something about being kicked. *Id.*, p. 60.

Detective Stone testified that she consulted David Acosta, a New Haven police department use-of-force trainer. The interviews of Officer Acosta were transcribed and entered as exhibits, City Exhibits 37 and 45. *Id.*, p. 62. Officer Acosta reviewed the videos⁵ and concluded that the punch was justified, but that the alleged “kick” and the hair-pulling were not, although Officer Acosta told the detective that the use of kicks and the pulling of hair were both techniques that officers were trained could be used with justification, depending on the totality of circumstances. *Id.*, pp. 59-60.

The City offered the various videos the IA officers reviewed as part of its case in chief through Detective Stone. Whether the videos clearly show anything other than officers patiently and deliberately trying to defuse the rambling of a drunken, and perhaps psychotic, detainee are an open question. Indeed, on cross examination, Det. Stone acknowledged that when she interviewed the arrestee, Mr. Rivera, in connection with the internal affairs interview, Mr. Rivera said “he didn’t even realize he’d been kicked until he saw a video of it.” *Id.*, pp. 106, 108.⁶ When Mr. Rivera reviewed a video

⁵ The panel reviewed the videos as part of the City’s case-in-chief. See, for example, November 4, HT, p. 68.

⁶ Mr. Rivera had this to say about the alleged “kick” after viewing the video: “It wasn’t a real hard kick, you know, it was for me. You know, it just – he step and he kicked me. I didn’t know he kicked me.” *Id.*, p. 109. Whatever else this testimony may mean, it

of his conduct on Christmas morning, he told Det. Stone: “I was disgusted by myself.” As Mr. Rivera put it when asked about whether he recalls saying something about being kicked in the groin: “My brain is fucked up, so – I didn’t feel it but I remember saying that.” Even Det. Stone acknowledged that Mr. Rivera was engaged in “a little trash talking on the street that day.” Id., p. 111. Mr. Rivera also complained that “I’m just trying to breathe.” Id., p. 112. Finally, Det. Stone acknowledged that, on review of the videos, Mr. Rivera appeared to kick [Officer] Santiago between the legs with his right foot. It’s not clear if this was intentional” Id., p. 125. Significantly, Det. Stone never bothered to ask Officer Santiago if he lost his balance in the confrontation with Mr. Rivera. Id., p. 129. However, Officer Santiago did tell Det. Stone that the contact his foot made with Mr. Rivera’s groin was not intentional; Det. Stone had no reason to believe that Officer Santiago was being untruthful when he stated that. November 19, 2021, HT, pp. 11-12.

The City’s next witness was Sergeant Christopher Fennessy, a twelve and one-half year veteran of the New Haven Police Department and an internal affairs investigator. Id., pp. 61-62. He was the supervisor of the investigation involving Officer Santiago. Id., p. 64. He testified that “Officer Acosta is what we refer to as a subject matter expert. He’s a Police Officer Standards and Training Council Certified Instructor in Application of Use of Force....” Id., p. 67. Sergeant Fennessy did NOT reach a conclusion that Officer Santiago used excessive force before speaking to Officer Acosta. Id., p. 74. He then testified that he could make the judgment that the force was

certainly is consistent with the grievant’s theory that if there was, in fact, foot-to-groin contact it was incidental, and most likely a consequence of losing one’s balance at close quarters.

excessive without speaking with Officer Acosta. Id., pp. 75-78. Officer Acosta's opinion was apparently necessary to assure that the investigation was thorough. Id., pp. 75-78, 101. He acknowledged that the IA investigators interviewed Officer Acosta before they had conducted any interview with Officer Santiago. Id., p. 105. He testified that the findings involving Officer Santiago had nothing to do with his race. Id., p. 96.

Officer David Acosta was the City's third witness. HT, p. 109, et seq. He testified that he's been a member of the New Haven Police Department since 2004, and has been assigned to the city's Police Academy Training Division, where he trains both members of the New Haven Police Department and other law enforcement officers. Id., pp. 110-111. He offers training in the use of force. Id. He reviewed reports and videos in association with the investigation of Officer Santiago's treatment of Mr. Rivera. Id., pp. 114-115. He opined that if the alleged kick were intentional, it was an unreasonable use of force. Id., p. 117. As to the hair, he opined that if Mr. Rivera were being lifted by the hair, that is, if the "hair is what was actually bearing weight," it would be unreasonable use of force. Id., p. 119. He also opined that the punch to Mr. Rivera's face was reasonable. Id., p. 120. However, he stated that he told IA investigators that these opinions were provisional: "I can't say with any degree of certainty whether [the use of force is]... inside policy or outside policy without having [Officer] Santiago's perception of what was taking place at the time." Id., p. 124. Crucially, he was never provided with any information on Officer Santiago's perspective by investigating officers. Id., pp. 123-124. Indeed, he cautioned the IA investigators that "it's just important that we always understand respective of the officer taking into consider the totality of the circumstances, understanding that officers are generally asked to respond to rapid,

certain, tense and constantly evolving situations,...” Id. pp. 136. He acknowledged that this is the very standard articulated by the United States Supreme Court in *Graham v. Connor*. Id., p. 138.

On cross-examination, Officer Acosta testified that he could not offer an opinion on whether the pulling of Mr. Rivera’s hair was unreasonable. Id., p. 145. Similarly, Officer Acosta did not have an opinion, on cross-examination, whether the alleged “kick” was unreasonable Id., pp. 154-155. It appears he tried to request additional information from the IA investigators about Officer’s Santiago’ and his state of mind, but that he never received the information. The City attempted to rehabilitate the witness by asking a series of hypothetical questions, but, even after answering those questions, Officer Acosta could not offer an opinion that Officer Santiago’s use of force was unreasonable. Id., pp. 167-168.

The City’s case collapsed before the panel’s very eyes.

At the third day of evidence, January 19, 2021,⁷ the City called outgoing Police Chief Otoniel Reyes. January 19, 2021, pp. 9, et seq.

Upon learning of the referral of the matter by the New Haven State’s Attorney prosecuting Mr. Rivera for, among other things, assault on a police officer, the chief referred the matter to an Internal Affairs investigation. As the Chief understood it, defense counsel for Mr. Rivera had brought the attention of prosecutors a private, or “amateur,” video of the incident and expressed an intention to make public the video. Id., pp. 15, 39-40. The Chief elected to seek an investigation, apparently, rather than see

⁷ The hearing scheduled for December 11, 2021, was postponed by request of the grievant after a union observer was injured in an automobile accident and could not monitor the proceedings.

the private video disclosed to the public. This panel saw both the police videos and the private video.

After receipt of the IA finding that Officer Santiago violated departmental policies by using excessive force, the chief interviewed Mr. Santiago. He was distressed that Mr. Santiago did not take “accountability... He never said, you know what, I did this. I caused this for the department,...” ID, p. 21. After consulting with his command staff, the chief elected to seek termination of Officer Santiago. Id., pp. 22-23. Termination was a decision that the chief could not make himself; rather, the decision had to be made by the Board of Police Commissioners. Id., p. 23. Somehow, the chief managed to see Officer Santiago’s case through the prism of the George Floyd homicide in Minnesota. “We had just stood in front of ... the police department to say we stood up against police brutality for what happened to George Floyd,... the point is that we’re telling our community that we’re holding ourselves to a higher standard....” Id., p. 24. In the end, the chief could not articulate what the matter involving Mr. Santiago had to do with George Floyd, Id. p. 38, and he appeared to backtrack from his initial declaration. He also testified that the case involving Officer Santiago ceased being “high-profile” once Mr. Santiago had been discharged. Id., p. 54. The decision to terminate Officer Santiago took place in late June or early July 2020. Id., p. 60.

Over objection from the grievant the City was permitted to call an attorney, Eric Daigle, as use of force expert. The grievant contended, and contends here, that this after-acquired evidence sheds no light on whether the City had just cause to terminate or otherwise discipline Officer Santiago. Attorney Daigle reviewed the material available to the IA officers, the transcripts of the hearings to date, and opined that Officer

Santiago used excessive force for the alleged “kick,” the hair pull, and punch. Id., pp. 89-92. The grievant did not bother to cross-examine, save to note the hourly fee Attorney Daigle earned. Id., pp. 92-93.

The alleged victim of police misconduct, Mr. Rivera, was not called as a witness, presumably because the criminal charges against him related to the Christmas morning struggle are still open.

B. The Grievant’s Evidence

Mr. Santiago called a series of character witnesses and testified on his own behalf on the final day of the hearing, February 1, 2021.

New Haven Police Officer Eduardo Leonardo testified that he had been on the force for seven years, and knew Officer Santiago during that period. Id., pp. 8-9. He trusts Officer Santiago, and knew Officer Santiago to have a reputation for truthfulness in the community. Id., p. 11. Officer Santiago was regarded as an effective police officer by his fellow officers and by members of the community. Indeed, Officer Santiago lived for a time as an Officer-In-residence Program at the Waverly Townhomes. Id., p. 11.

Officer Leonardo also testified that he was present at a roll-call in mid-July when Mayor Elicker told assembled police officers that he stood by the decision to fire Officer Santiago and that he would fire any officer who struck a man who was handcuffed. Leonardo complained to his union that the Mayor was defending a decision to terminate an officer whom the IA process has exonerated by finding that the punch was justified, wiring a letter of protest to the union on July 16, 2020. Id., pp. 15-16.

Trevor Burke testified that he had known Mr. Santiago for more than 15 years, meeting him first when Officer Santiago was a student at Western Connecticut State

University. Id., pp. 25-26. While at the university, Officer Santiago, who studied criminal justice, worked on the campus police force as a patrol/medical aide. He served selflessly. “He’s always putting others before himself, including a protective instinct to protect those around him, especially those ones that couldn’t protect themselves.” Id., pp. 27-28.

New Haven Police Officer Eric Aviles testified that he had been on the force for about eight and one-half years, and that he has known Officer Santiago throughout that period. Id., pp. 33-34. Officer Santiago is, in his opinion, a “high standard guy,” who served on the department’s honor guard and on the SWAT team in one of the city’s busiest districts. Id. Officer Santiago is known throughout the community as both a good police officer and an honest person. Officer Aviles also referred to the grievant as an “outstanding officer,” recounting an occasion when Officer Santiago helped subdue a knife-wielding subject without injury either to the subject, the public or officers. Id., p. 37-38. When asked whether he trusts Officer Santiago with his own life, Officer Aviles replied: “I have and yes, I will.” Id., p. 39.

New Haven Police Officer Joseph Bleck also testified on behalf of Officer Santiago. Officer Bleck had been on the force since 2014. Id., pp.43-44. Both men played football together at Western Connecticut. Officer Santiago was a team captain, Officer Santiago was one of the best police officers with whom Officer Bleck worked and was instrumental in helping to train Officer Bleck. The officer testified that Officer Santiago has a reputation for truthfulness. Id., p. 45. Like Officer Aviles, Officer Bleck trusts Officer Santiago with his life, and would like to see Officer Santiago returned to

the department. Other members of the department have expressed similar sentiments. Id., pp. 47-48.

Officer Santiago testified on his own behalf. February 1, 2021, HT, pp. 51-et seq.

Officer Santiago is a native of Puerto Rico, having immigrated to the states about 30 years ago, settling with his family in central Connecticut. Id., pp. 52-54. After graduating high school, where he was captain of the football team, he enrolled at Western Connecticut State University, where he attended a program, the Educational Achievement Access Program, to prepare him for college. Id., pp. 56-57. He majored in justice law administration, the equivalent of criminal justice, playing football four years, and ending his athletic career as captain of the team. Id., p. 57. While at Western, he worked as a counselor and then director of the very program he used to prepare himself for college. He graduated Western in 2010. Id., p. 60. He applied to become a New Haven police officer thereafter, and attended the New Haven Police Academy in 2012. Id., p. 62. After graduating from the academy, he successfully completed a field-training period, struggling some in report writing, but ultimately becoming certified in Crisis Intervention, Patrol Rifle Operator and the Honor Guard. He also served as a field training officer, helping to break new recruits into the rigors of policing in New Haven. Id., pp. 63-65. He became a member of the department's SWAT team in 2018. Id., pp. 66.

Twice during his tenure as a New Haven Police Officer, Officer Santiago was awarded Medals of Valor, once for de-escalating a confrontation with a man armed with a handgun at a nightclub, and once for apprehending a man wanted in connection with a series of home invasions. Id., pp. 67-70. He also participated in the Officer-in-

Residence Program, a joint initiative between the police department and the city's housing authority, in which Officer Santiago lived in public housing in a distressed community. By residing in the community he was policing, he increased trust and, in theory at least, encouraged those in the community to regard him, and the police department, as an asset rather than an enemy. He resided there for four years, helping many young people navigate the hurdles of young adulthood in such areas as obtaining employment, finishing school and getting driver's licenses. *Id.*, pp. 70-73.

In sum, Officer Santiago, throughout his career, was trusted by his colleagues and the community. He exhibited heroism and restraint in difficult circumstances, and was a visible credit to a department that had twice given him awards for valor. He was not the sort of officer to engage in gratuitous violence.

On Christmas morning 2019, Officer Santiago was working the seven a.m. to three p.m. shift, when he responded to a call for assistance from Officer Hinton. *Id.*, pp. 73-74. When he arrived at the scene, he saw a white van that appeared to have been involved in an accident, and a man, Mr. Rivera. It appeared a female was trying to stop Mr. Rivera from charging at Officer Hinton. *Id.*, p. 76. Both Mr. Rivera and the female were yelling and screaming as Officer Santiago approached the group. Officer Hinton explained that he wanted to have the van towed; Officer Santiago decided to try to move Mr. Rivera from the middle of the street, where the confrontation was taking place. *Id.*, p. 77. Mr. Rivera had clenched fists, was swearing and was behaving in a very aggressive manner. It appeared to Officer Santiago that Mr. Rivera was intoxicated, either by drugs, alcohol or both. *Id.*, p. 79.

As Officers Santiago and Leonardo, who had since arrived, tried to move the female, Mr. Rivera became enraged, saying, “Don’t fucking touch her,” and squared off using gestures, including hitching up his pants, that Officer Santiago associated with a person preparing to fight. Id., p. 80. Sensing danger, Officer Santiago tried to place Mr. Rivera in handcuffs. Officer Santiago had no interest in a custodial arrest. It was Christmas morning. “But once [Mr. Rivera] started fighting, kicking and punching and everything like that, it just like turned it to a whole – a whole ‘nother level.” Id., p. 82. Officer Santiago grabbed Mr. Rivera by the legs, as Mr. Rivera tried to kick him. Mr. Rivera actively resisted being subdued, grabbing onto the wheel of the van and trying to pull away. Id. Officer Santiago used a pain-compliance technique he had been trained to use on Mr. Rivera’s legs in an effort to subdue him. Id., p. 83. The technique worked. As Officer Santiago got up, winded from the struggle, he stumbled and tripped over Mr. Rivera’s leg at some point. He did not intentionally kick Mr. Rivera and did not hear Mr. Rivera complain of having been kicked. He testified that folks complain saying such things as “I can’t breathe, excessive force, police brutality,” “[p]retty much every time you put your hands on someone they’re screaming about something that you’re not even doing. They’re just screaming utterances.” Id., pp. 85-86. Officer Santiago had no reason to believe on Christmas morning that his foot had made contact with Mr. Rivera’s groin. Id.

Officer Santiago was concerned about spitting as it is a vector for conveying infectious disease. He understood it was a felony offense to spit at an officer. Id., p. 87.

As the officers helped Mr. Rivera to his feet, Officer Santiago grabbed ahold of Mr. Rivera’s hair and the left side of his body. He did not yank Mr. Rivera up by the hair.

Officer Hinton assisted. He grabbed ahold of the hair to control the movement of Mr. Rivera's head, in order to direct Mr. Rivera's face away from the officers, so as to avoid being spat upon. *Id.*, p.88. As the men released Mr. Rivera from their control, Mr. Rivera spat at Officer Santiago, with Mr. Rivera's saliva landing on his face and in his mouth, as testified to by Det. Stone and as can be seen on the video. Officer Santiago struck him in the mouth with a closed fist. *Id.*, pp. 89-90.

Officer Santiago was surprised to hear the City's after-acquired expert, Attorney Daigle, refer to color-coding of areas that could be struck, indicating that Attorney Daigle used a color-coding system attributable to the use of batons, not hands. *Id.*, pp. 91-92.

Officer Santiago was placed on administrative leave pending the investigation of the Christmas Day event. Shortly before public protests erupted in New Haven after the George Floyd death in Minnesota, Officer Santiago was returned to active duty to assist in controlling the uproar of protestors. *Id.*, pp. 95-96. During this period, he assisted in removing a suspect believed to be armed from a burning car. *Id.*, pp. 97-100. Officer Santiago was fired the following week. *Id.*, p. 99.

At his *Loudermill* hearing, the Chief berated Officer Santiago for his conduct on Christmas morning, telling him "pretty much ... that he had to, you know, sacrifice me for the better good of the men and women of the department because he didn't want any more protests to occur in the City of New Haven,..." A few days earlier, Officer Santiago stood on front steps of the department facing protestors who threw bottles at the officers. *Id.*, p. 101. After he was fired, other officers told them they were afraid to do their jobs now that the department appeared to make political sport of routine applications of force in an arrest.

IV. Argument

A. The Evidence Considered By The City At The Time Of Termination Did Not Constitute Just Cause For Termination; That Evidence Failed To Pass Muster Before The SBMA

The termination in this case is shocking. A candid review of the lengthy videotapes of the treatment of Mr. Rivera reflects patience, restraint and skill dealing with an obviously intoxicated and disturbed man. The impact of this termination, and of Mayor Elicker's declaration that he would terminate others for conduct the department's own use of force trainer found justified, reflect a lack of leadership at the highest levels of New Haven's politics that will, in the end, cost the life or lives of officers and potentially citizens involved in the often tense and rapidly evolving crises that take place all too often on the city's streets.

Officers are justified in using force to overcome resistance of those failing to comply with lawful commands.⁸ Does the City really want officers to adopt a "catch and

⁸ The federal standard force claims in a fourth amendment context is set forth as follows:

The Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "*the nature and quality of the intrusion on the individual's Fourth Amendment interests*" against the countervailing governmental interests at stake.... Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.... Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,"... however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to

release" theory of law enforcement, where a detainee can, simply by behaving as did Mr. Rivera, walk away when the risks of taking him into custody are potential political embarrassment should protestors decide, without a full investigation, that they are outraged by what the evening news decides to broadcast? The union implores the panel to do better than the politicians have done.

A young and inexperienced prosecutor alerted the New Haven Police Department about questionable use of force months after the event. By the time an investigation began, mass protests involving police use of force began to rock the nation. The result was a botched and incomplete investigation. An IA investigation relied on the city's use-of-force expert to evaluate an officer's conduct. But in the rush to make a judgment, the investigator was never given a chance to review Officer Santiago's statement, or to interview him, despite indicating that in the absence of that crucial information his opinion was only provisional at best. When Officer Acosta testified before this panel, he did not say that Officer Santiago used unreasonable force. He

the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight....

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,... " violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

Graham v. Connor, 490 U.S. 386, 396-397 (1989)(citations omitted).

lacked sufficient information. Had the City an eye to something other than public opinion, this case would have ended there. It should have ended there.

Instead, the City retained a lawyer it uses to train officers to give an opinion. After two full days of hearings, and well after Officer Santiago's termination, that expert gave the City what the City paid for – an excuse to terminate. Officer Santiago urged the panel to place no weight on this after-acquired evidence, asserting that the standard is just cause at the time the termination was made, not a post hoc rationalization for decisions hastily and improvidently made in the heat of a so-called “racial reckoning.”

B. The After-Acquired Evidence Doctrine Has Never Been Used In Connecticut To Permit A Party To Supplement A Defective Record With Newly Acquired Evidence

While Connecticut does recognize the after-acquired evidence doctrine, the undersigned has been unable to locate a case in which the doctrine was used to permit a party to call a new expert to opine on old evidence in the manner that took place here. Simply put, the expert the City relied on to support its termination decision recanted at the arbitration. The City was permitted to call a new expert. That expert was permitted to testify in a manner even more favorable to the City than the expert on whose decision the City relied to terminate. Whereas Officer Acosta provisionally found only the punch justified, and condemned the “kick” and hair-pull, the new expert found all three forms of the use of force unjustified. Just how the latter-day expert sheds any light whatsoever on the termination decision made in this case remains a mystery.

After-acquired evidence is typically, and almost universally, used only to determine the extent of damages, or the remedy, a party wrongfully discharged may receive. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995): “after-

acquired evidence must be taken into account in determining the specific remedy, lest the employer's legitimate concerns be ignored.... It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.*, pp. 360-62, cited in *City of Torrington v. AFSCME Council 4, Local 1579*, 2002 Conn. Super. Lexis 2290, *28 (vacating an award in union's favor after arbitrators concluded that the grievant had not engaged in the conduct for which he was fired, but where it was learned during the hearing that the grievant had lied in his employment application). See also, *Preston v. Phelps Dodge Copper Prods. Co.*, 35 Conn. App. 850(1994) (proper role of after acquired evidence affects damages for breach of contract).

There are equitable limitations on the use of after-acquired evidence to prove liability. "[I]t is settled, of course, that after-acquired evidence may not be used to prove an employer's *motivation* with respect to a prospective or current employee because the employer did not have those facts before it at the time it made the contested decision." *Tomick v. UPS*, 1578 Conn. App. 312, 333 (2015), citing, *Curry v. Allan S. Goodman, Inc.*, 286 Conn. 390,422 n. 19 (2008)(after-acquired evidence may be used to rebut a claim in an employment disability claim that an employee was able to perform job at the time of adverse employment action). "[T]he prohibition of after-acquired evidence addresses the evil of offering after-the-fact rationales for adverse employment actions." *Curry*, 422 fn. 19, citing, *D'Amico v. New York*, 132 F.3d 145, 151 (2d Cir.).

In this case, no new facts were offered to the panel to justify the decision to terminate Mr. Santiago. After the initial expert on which the City relied recanted during cross-examination, the City went out and purchased itself a new expert. Not

surprisingly, the newly purchased expert gave the City even more than the original expert: he supported all three claims of unreasonable force, as the “kick”, the hair-pulling and the punch. The Panel’s coy declaration that it would permit this new evidence and accord it what weight it saw fit rings like a prostitute’s declaration of chastity: On the record considered by the City and examined by the panel, there simply was no justification other than political expediency for the firing.

V. Conclusion

The union requests that the arbitration award be vacated on the grounds that the after-acquired evidence was admitted in error, and that he be reinstated with full pay and retroactive benefits. In the alternative, he requests a remand to the panel for the purpose of inquiring of the panel whether they had pre-existing, and undisclosed, biases.

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CERTIFICATION

This is to certify that a copy of the foregoing was emailed and mailed, postage prepaid to:

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